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When Special Exceptions Become Nonconforming Uses

Barbara Jay

The Board of Appeals has recently observed an increase in the number of special exception uses being converted into nonconforming uses by changes to the Zoning Ordinance. Section 59-A-2.1 of the Zoning Ordinance defines the term "Nonconforming use" as "[a] use that was lawful when established and continues to be lawful, even though it no longer conforms to the requirements of the zone in which it is located because of the adoption or amendment of the zoning ordinance or the zoning map." Case law parallels this definition. See *Lone v. Montgomery County*, 85 Md. App. 477, 496, 584 A.2d 142 (1991).

This conversion from a special exception use to a nonconforming use occurs by operation of law when the

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Hiring Workers with Prior Injuries: The Subsequent Injury Fund

Wendy Karpel

Many employers require new employees to fill out health evaluation questionnaires or to take pre-employment physicals. From a workers' compensation standpoint, such practices are very important and this paperwork should be kept in the employee's medical/personnel file. In the future, if that employee files a workers' compensation case, this information will prove to be valuable to minimize the employer's liability on the claim and to allow the employee to seek benefits from the state's second injury fund which is called the Subsequent Injury Fund (SIF).

The SIF is a fund created by the Maryland state legislature to provide compensation to workers who have injuries that pre-exist their workers' compensation injury. Its purpose is to persuade employers to hire previously disabled employees by limiting the liability that the employer may otherwise encounter if a pre-existing injury fund did not exist. For example, an employer may not want to hire an employee with eyesight in only one eye, because if that employee loses the other eye on the job, the employee will be totally disabled. As a result, if no SIF existed, the employer would be responsible for compensation to this employee for the rest of his/her life. With the creation of the SIF, the legislature ensured that this situation would not arise. Instead, the SIF is responsible for the first eye and the employer will only be responsible for the disability caused by the loss of the second eye.

Having the SIF available allows all parties to be protected. In the example where the employee is now totally blind, the employer will not be responsible for a

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Zoning Ordinance is amended to eliminate the prior use, or to substantively change the criteria applicable to the previously lawful special exception use, provided no grandfathering provision is included. Substantive modifications can include anything from a shift in the emphasis between the various criteria for a use to the wholesale elimination of the previously lawful use.

The effect of this conversion is to remove the use from the Board's jurisdiction and place it, instead, under the jurisdiction of the Department of Permitting Services (DPS). The use remains subject to any conditions of the special exception grant that were applicable to the special exception use at the time it became nonconforming. While the use can be intensified, it cannot be extended.

Section 59-G-4.16 of the Zoning Ordinance sets forth a formal procedure by which owners can have former special exception uses certified as nonconforming by DPS. It is important to remember that certificates of nonconforming use are provided at the request of and for the benefit of the property owner, and while they attest to the nonconforming status of a use, they do not, in and of themselves, "make" the underlying use nonconforming. If a question as to the status of a use arises during a Board proceeding (e.g. during a show cause hearing), the Board can engage in the fact finding and legal analysis necessary to determine whether or not the special exception use has become a nonconforming use. Either way, once it has been determined that a use is nonconforming, it is up to DPS and not the Board to monitor that use and see that it does not expand beyond its lawful limits. ♦

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permanent total disability. At the same time, the employee benefits because the employee receives compensation from both the employer and the SIF. The employer will compensate the worker for the damage to the one eye and the SIF will be able to provide compensation as a result of the claimant now being totally blind.

The records that the employer keeps are invaluable in determining when the SIF can be brought into a case. Keeping these records serves a dual role. First, it ensures that the employer only pays for injuries that occur on the job. Second, the records will make it easier for the worker to receive compensation for pre-existing injuries. ♦

Use Departmental Guidelines As Your Minimum Standard of Care

Christopher Hinrichs

Virtually every department within the Montgomery County Government has implemented guidelines, rules, or protocols. These directives should be used for more than paperweights, as ignorance of them could result in liability for the County and/or its employees.

Recently, the Court of Special Appeals decided that the Baltimore City Police Department's guidelines for entering an intersection could be used as evidence of the standard of care for the purpose of showing how the officer was obligated to enter an intersection during an emergency response.

The controversy over the use of internal directives at trial began with an automobile collision involving Michael L. Hart and Baltimore City Police Officer Mark V. Greff. The collision occurred at the intersection of Madison and Wolf Streets in Baltimore City on February 16, 2002. Mr. Hart asserted that he was driving his vehicle westbound through the City and entered the intersection under a green light when his vehicle was struck on the side. Officer Greff's position was that, as he approached the subject intersection with his lights and siren on, he slowed his vehicle and was under the impression that all vehicles were going to yield and stop for him.

Mr. Hart's attorney presented to the jury the Baltimore City Police Department's General Order 11-90. General Order 11-90 required Officer Greff to bring his vehicle to a "FULL STOP" prior to entering an intersection under a red light. Attorneys for Baltimore City argued that, under Maryland law, an emergency vehicle need not come to a complete stop under these circumstances. The Circuit Court judge ruled that, since the Code of Public Laws of Baltimore City authorizes the Police Commissioner to make rules, he could increase the standard of care - although he could not decrease it in violation of State law - and that the rule was specific and non-discretionary. Therefore, the Officer had to follow it to be in compliance with the standard of care. As a result, the jury could be

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False Imprisonment or Honest Mistake?

Paul Leonard

The Court of Appeals of Maryland recently considered when a detention center may be liable for false imprisonment where the wrong individual has been detained. The decision is of interest to Montgomery County because the County operates a detention center and a Central Processing Unit for holding prisoners who are awaiting judicial proceedings.

On Friday, March 7, 2003, Evelyn Yulonda Dett was stopped for a traffic violation by Officer Moore, Baltimore City Housing Authority. A routine background check revealed an outstanding warrant for the arrest of Vanessa Hawkins, "a/k/a Evelyn Dett." The warrant identified Ms. Hawkins as a black female, born on July 11, 1963, and bore a "SID Number of 381961." A SID number is an identification number uniquely linked to an individual's fingerprints.

Although Ms. Dett protested at the scene that she was not Vanessa Hawkins, she was taken into custody and delivered to the Baltimore City Central Booking and Intake Center (CBIC). There, she was booked, photographed, and fingerprinted. Her fingerprints were sent to the Central Records Unit and a response came back indicating that the

fingerprints corresponded to SID Number 2413966, a number different from the SID Number on the outstanding warrant for Vanessa Hawkins. Despite the numerous inconsistencies, no further effort was made over the weekend to determine whether she was, in fact, Vanessa Hawkins. Ms. Dett remained at the Detention Center until Monday morning, when Detention Center personnel obtained a photograph of Vanessa Hawkins and determined that Evelyn Y. Dett and Vanessa Hawkins were two different people. By then, Ms. Dett had been in detention for three and one-half days.

Evelyn Dett filed a civil suit against the State of Maryland, CBIC, and the Detention Center for alleged false imprisonment and violation of her rights under the Maryland Declaration of Rights. The State defendants responded with a motion for summary judgment, asserting that they had legal justification to detain Ms. Dett by virtue of her arrest, the outstanding warrant, and the commitment order. They argued that they had no affirmative obligation to conduct an investigation to determine whether they were holding the correct person but, in any event, did eventually conduct some investigation and released Ms. Dett once it was established, conclusively, that she was not Vanessa Hawkins. Ms. Dett responded that she had protested to authorities that they were holding the wrong person and that they should have known from the inconsistencies that she was not Ms. Hawkins. The motion for summary judgment was granted. The Court of Special Appeals reversed the decision. The Court of Appeals took the case for further review.

On appeal, the central issue was whether the State defendants had "legal justification" for continuing to detain Ms. Dett, based on the information available to them. The Court did not have a problem with the conduct of Officer Moore in arresting Ms. Dett, based on the information available to him. Nor did the Court believe that the authorities necessarily had any duty under the law to investigate whether they had the right person. However, the Court was troubled by CBIC and the Detention Center's failure to act upon clear evidence that they were holding the wrong person.

The Court found that most courts apply a "reasonable belief test" in assessing whether there is a legal justification for a detainment where the subject's identity is in question. The test is whether the person detained "is reasonably believed by the actor to be the person intended to be

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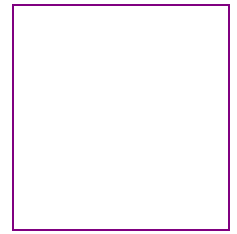
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ADDRESS CORRECTION REQUESTED

Departmental Guidelines

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presented with the General Order.

The Court of Special Appeals found that the jury instruction involving the General Order was not properly preserved for appeal. However, the Court did announce that, when given in the proper context, such directives may be given in jury instructions and presented as the law.

In conclusion, the Court of Special Appeals has now made it clear that, in simple negligence cases, internal directives - when promulgated under legal authority - may be used as “a factor to be considered” by juries against governmental entities and/or employees when conduct is in violation of a relevant directive resulting in harm. ❖

Mayor and City Council of Baltimore v. Michael Lee Hart, 2006 Md. App. Lexis 15 (February 2, 2006).

False Imprisonment

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detained.” The Court found that, once the CBIC and Detention Center came into possession of the contradictory information on the differing SID numbers, the non-matching social security numbers, dates of birth, and physical descriptions, the State could no longer have reasonably believed that they were holding Vanessa Hawkins. At that point, they were required to take the necessary steps, as promptly as possible, to release the detainee. The Court determined that it was not appropriate to grant the defendants’ summary judgment on the false imprisonment claim. The decision of the Court of Special Appeals was affirmed.

While detaining authorities may have a minimal obligation to actively investigate whether they have the correct person in their custody, once compelling evidence of misidentification comes to light, it is then necessary to release the person. Otherwise, those officials may well be required to defend a suit for false imprisonment. ❖

State v. Dett, 2006 Md. LEXIS 64 (February 7, 2006).